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IN THE

Supreme Court

OCTOBER TERM, 1946

No. 1310

BUSH TERMINAL RAILROAD COMPANY,

Petitioner,

—against—

BUSH TERMINAL BUILDINGS COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOR THE SECOND JUDICIAL DEPARTMENT AND BRIEF IN SUPPORT THEREOF.

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

ARTHUR GARFIELD HAYS,
JOHN SCHULMAN,
OSMOND K. FRAENKEL,
MORRIS SHILENSKY,
Of Counsel.

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Petitioner,

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE SECOND JUDICIAL DEPARTMENT.

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, BUSH TERMINAL RAILROAD COMPANY, respectfully represents and petitions for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department as follows:

Summary Statement.

Petitioner seeks to review a judgment of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department affirming the judgment of the Supreme Court of the State of New York for the County of Kings. The determination is final since an

application for leave to appeal to the Court of Appeals was denied. The judgment sought to be reviewed compels petitioner, an interstate common carrier by railroad, to perform a railroad service in a special manner until 1960, by directing specific performance of a private contract made in 1911 (93*).

The action involved the practice to be followed in collecting and delivering lss than carload freight, i.e., package freight. The decree compels petitioner to transport between certain buildings and a nearby freight house all package freight, no matter how small the package, in railroad cars and prohibits petitioner from using the modern method of transporting such packages by trucks, a method which is universally used and which petitioner employs in handling package freight of its other shippers.

Petitioner is a common carrier of freight by railroad subject to Part I of the Interstate Commerce Act and to the jurisdiction of the Interstate Commerce Commission. It operates a railroad in Brooklyn, New York. All but an insignificant part of its operations are interstate, its chief activity being the movement of freight between New Jersey and Brooklyn and delivering or collecting such freight in Brooklyn.

Plaintiff, Bush Terminal Buildings Company, a real estate operating company, is the owner of two groups of industrial buildings in Brooklyn. Both are served by the petitioner railroad. One of these groups of buildings has become known as Buildings 1-10; the other as Buildings 19-26. These two groups of buildings are only a few city blocks apart. The buildings are occupied entirely by tenant engaged in various industries. Plaintiff itself neither ships nor receives freight via petitioner's railroad at these buildings. The occupants of these buildings, however, do.

* All references are to folios in the record in the State Court, except where otherwise noted.

Nonetheless, none of the tenants was a party to the instant litigation.

The method of petitioner's collection and delivery of package freight to and from these two groups of buildings has been subject to two challenges. As to Buildings 19-26, plaintiff challenged the method before the Interstate Commerce Commission. As to Buildings 1-10, the attack was made in this lawsuit. The challenge before the Interstate Commerce Commission was unsuccessful.

In 1944, the Interstate Commerce Commission (in a litigated proceeding to which petitioner, plaintiff, some of the tenant shippers, and nine of the trunk line railroads serving Eastern United States, were parties), determined that it was proper for petitioner railroad to use trucks in moving package freight betwen Buildings 19-26 and petitioner's freight house some half mile away. The Interstate Commerce Commission also determined that petitioner railroad should not be required to use railroad cars in this short part of the haul, and that the public convenience and necessity would not be served by requiring the railroad to use cars in any such operation (Bush Terminal Railroad Company Operation, 257 I. C. C. 375).

That decision, made after exhaustive inquiry into the facts, was not challenged in the Courts and stands as a final administrative determination of the rights of the parties and the propriety of the service involved.

The service as to the other group of buildings, namely, Buildings 1-10, was not directly in issue in that case because of the nature of the proceeding.*

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* The proceeding had been instituted by petitioner under Section 1(18) of the Interstate Commerce Act for permission to extend its line of railroad by leasing facilities from its corporate parent, Bush Terminal Company. Plaintiff herein and other parties sought and obtained permission to intervene in that proceeding. In their answers they asked that if the lease be approved such approval should be conditioned on the railroad being required to give the particular type of service which the lessor had been giving prior to 1942, to wit, use of railroad cars for less than carload freight to and from Buildings 19-26. Buildings 1-10 had theretofore been served by the existing lines of petitioner railroad and were not directly involved in the lease or the proceeding for its approval.

In the present case the challenge was successful. *Thus, different service is provided by petitioner railroad at two groups of plaintiff's buildings where conditions are in all respects identical.* If, for example, the railroad has two packages each of a few hundred pounds to be delivered, one to a tenant in Buildings 19-26, and the other to a tenant in Buildings 1-10, it must send the package to Buildings 1-10 in a railroad car, but it may use a truck to deliver the similar package to Buildings 19-26. And trucks are so used for delivering packages to all other buildings in Brooklyn.

In its complaint in this action, plaintiff relied on a contract made in 1911 which it claimed obligated petitioner to use railroad cars exclusively for the movement of all freight, including package freight. Plaintiff asked the Court to require petitioner specifically to perform the contract by providing freight cars for the transportation of this package freight to and from the shipping platform of each of plaintiff's buildings 1-10 (31).

As enforced by the State Court, this contract requires the railroad until 1960 to serve Buildings 1-10 by railroad cars only, both as to carload freight and less than carload, or package, freight. A package might weigh only 100 pounds and might have to be transported in a freight car which weighs many tons. The waste is obvious Admittedly the contract was made at a time when petitioner railroad and plaintiff were under common corporate control. The contract on its face states that it was made in order to promote the sale of private real estate bonds issued by plaintiff, not a public utility. Plaintiff's claim in the action as sustained by the Court was that this contract assured to the occupants of Buildings 1-10 a unique and special service until 1960, namely, the movement of all freight exclusively in railroad cars to the loading platforms of each of the ten buildings constituting the group.

From the very outset of the litigation, petitioner has taken the position that the Courts of the State of New York had no jurisdiction to determine the issues presented by the action and that these were issues for determination in the first instance by the Interstate Commerce Commission. This is the basic Federal question presented here.

The question was first raised by petitioner by a motion to dismiss the complaint. That motion was denied (47 N. Y. Supp. (2d) 330) in an opinion by Mr. Justice Steinbrink, who ruled that on the face of the complaint it did not appear that there was any issue for administrative regulatory determination. That decision was affirmed without opinion (267 App. Div. 991).

Thereafter, petitioner served its answer alleging eight defenses, only some of which are relevant here. The first defense (56-58) claims that the rendition of the service demanded by plaintiff would be in violation of the Interstate Commerce Act, because it called for a service not specified in any tariff on file. The fourth defense alleges that the rendition of the service would be in violation of the Interstate Commerce Act, because it would constitute an undue and unreasonable preference to plaintiff (65-67). The seventh defense alleges that the issues in the action must be determined in the first instance by the Interstate Commerce Commission and that the Courts had no jurisdiction over the subject matter of the action (83-86).

On the basis of this last defense (and a similar defense relating to the Public Service Commission of the State of New York) petitioner made a motion on affidavits under Rule 107 of the Rules of Civil Practice of the State of New York to dismiss the complaint on the ground that the Court was without jurisdiction because the issues presented by the pleadings required administrative determination. These issues were two-fold—whether truck or car service

was in the public interest, and whether undue discrimination resulted from giving car service to Buildings 1-10 and to no other buildings in the same area. That application was denied by Mr. Justice Smith in an opinion which has not been reported except in the New York Law Journal (October 21, 1944). He merely said that the case was governed by the earlier decision of Mr. Justice Steinbrink. Both the Appellate Division (268 App. Div. 998) and the Court of Appeals (294 N. Y. 723) affirmed without opinion.

Before the case went to trial, plaintiff obtained an injunction pendente lite which restrained petitioner from filing any tariff with the Interstate Commerce Commission relating to the service or rather the type of service in dispute. Had petitioner been permitted to file the tariff, plaintiff would have had an opportunity to protest it and the Interstate Commerce Commission could then have decided the question.

Petitioner was therefore effectively prevented from having the issue as to the propriety of the service passed on by the Interstate Commerce Commission rather than the Courts of the State of New York. Petitioner did make several attempts to bring the matter to the attention of the Interstate Commerce Commission, but it is understandable that while the matter was still before the Courts the Interstate Commerce Commission did not want to act on its own initiative.

Thereupon the case was tried before Mr. Justice Walsh. At the very commencement of the trial, petitioner moved to dismiss the complaint on the ground that the Court had no jurisdiction and that the matter was one to be handled by the Interstate Commerce Commission. That motion was denied (271). At the same time, petitioner moved that the trial of the action be stayed until the Interstate Commerce Commission investigated the facts. On

that motion decision was reserved (272). The record shows no formal disposition of that motion except, of course, by the decision awarding judgment to the plaintiff.

At the trial, it appeared without contradiction that petitioner's method of delivering package freight was uniform in the entire area and that this uniformity extended to the other buildings owned by plaintiff, known as Buildings 19-26 (1034-38, 1204-1257). It was proved without contradiction that no other buildings in that area, in fact no shipper in Brooklyn, received the service which plaintiff asked for in respect to its Buildings 1-10.

Plaintiff, in order to overcome the force of the uncontradicted proof that the service it claimed would constitute an illegal idscrimination, contended that Buildings 1-10 constituted a series of public stations. Petitioner contends that the very fact that such matter in alleged justification for the evident preference had to be introduced by plaintiff establishes that there was a non-justiciable issue and one which could be determined only by the Interstate Commerce Commission. Petitioner also contends that whether this was so or not, the evidence required, as a matter of law, the finding that Buildings 1-10 were not public stations.

Moreover plaintiff had similarly argued before the Interstate Commerce Commission that Buildings 19-26 were public stations and should therefore receive the special service. The Interstate Commerce Commission decided that even if those buildings had been public stations, petitioner should not be compelled to use only railroad cars; but that it was in the public interest that petitioner use trucks for the transportation of package freight between the buildings and the nearby 48th Street freight house (257 I. C. C. 375). Thus, by express holding of the Interstate Commerce Commission, the type of service for the carriage of package freight in this area does not in any

wise depend on whether a building is or is not part of a public station.* Nevertheless Trial Court below, in the present private adversary litigation to which no member of the shipping public was a party, has determined that ten private buildings covering five city blocks are entitled to special service because they are part of a public station.

Opinion and Decree Below.

The opinion of the Trial Court is found at pages 743 to 761 of the record. It is reported in 63 N. Y. Supp. (2d) 744. The portions of the opinion dealing with the Federal questions in the case are to be found at pages 750 to 754 of the record. Mr. Justice Walsh overruled the first defense which was based on the absence of any tariff by holding that the service called for by the contract was the same as that contained in the filed tariffs (2248). He overruled the seventh defense based on the Court's jurisdiction on the ground that this matter had been previously passed upon on the motion to dismiss made before trial (2249-2251).

Judge Walsh discussed more fully the fourth defense based on discrimination. He justified the rendering of service to plaintiff different from that rendered to buildings in the same area by holding that Buildings 1-10 constituted a public station (2252-2262).

He disposed of a very important question of public interest in the case, namely, the waste in use of railroad cars involved in complying with plaintiff's demands, on the ground that petitioner did not own any railroad cars and that all the railroad cars used belonged to connecting lines (2248). Judicial notice may be taken of the dire shortage of box cars presently and at the time of trial. The Interstate Commerce Commission gave great weight to this

* The Public Service Commission of New York in a later proceeding held that Buildings 19-26 were not public stations, *Bush Terminal Buildings Company* v. *Bush Terminal Railroad Company* (Ex. UU, p. 736—Case 11655, May 22, 1945).

problem (257 I. C. C. 375, at p. 391) in the Buildings 19-26 litigation.*

The Trial Court entered a decree requiring petitioner to perform the contract. Prior to the entry of the decree, petitioner sought to avoid possible conflict with the Interstate Commerce Commission by submitting a counter decree which would provide that performance in accordance with the contract was to continue only

> "until such time as the Interstate Commerce Commission or the Public Service Commission shall otherwise order or authorize" (118).

This was rejected. The unconditional decree was entered and was affirmed by the Appellate Division without opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended (§344, Title 28, U. S. C. A.). The decision of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department is a final decision of the highest court of the State in which a decision could be had because the Court of Appeals of the State of New York refused to review the same. The decision became final on February 21, 1947, when the Court of Appeals of the State of New York handed down its decision denying petitioner's motion made in that Court for leave to appeal to it. That motion was properly made under the law of the State of New York on January 13, 1947, within thirty days of the denial of a similar motion made in the Appellate Division on December 16, 1946. The motion made to the Appellate Division for leave to appeal to the Court of Appeals was properly made under the law of the State of New York because made

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* The Interstate Commerce Commission said:

"The applicant (Bush Terminal Railroad Company) submitted numerous exhibits, supported by testimony, showing that resumption of the freight-car service would be wasteful in the use of freight cars."

on December 6, 1946, within thirty days of the service on petitioner's attorneys of the judgement of affirmance with notice of entry thereof on November 21, 1946.

Questions Presented.

1. Whether the Courts of the State of New York had jurisdiction to render a judgment of specific performance whereby a common carrier is compelled to furnish railroad service in interstate commerce in a particular manner, for a fixed period of time, contrary to the service authorized by the Interstate Commerce Commission in a parallel case in the same area, without a prior determination by the Interstate Commerce Commission that the service was an appropriate one and that it was not unduly discriminatory?

2. Whether the Supreme Court of the State of New York should not have stayed its hand when it appeared that issues were presented which required consideration by the Interstate Commerce Commission?

3. Whether the contract as interpreted and enforced by the Courts of the State of New York is illegal because it gave plaintiff the right to require a common carrier by railroad to perform a special service in interstate commerce, when such right was not specified in any tariff on file, and because the service was unduly discriminatory as between shippers and consignees?

4. Whether the decree entered by the State Court is improper because it creates a conflict, or at least a potential conflict, with the jurisdiction of the Interstate Commerce Commission?

Reasons Relied On for the Allowance of the Writ.

1. The Courts of the State of New York have decided important questions of Federal law in conflict with previous applicable decisions of this Court. The State Courts have

ignored the settled law in this Court to the effect that where administrative questions are presented no judicial action can be taken until after the administrative questions have first been determined by the appropriate administrative agency (*St. Louis, etc.* v. *Brownsville District,* 304 U. S. 294; *Armour & Company* v. *Alton,* 312 U. S. 195). At the very least, the State Court action should have been stayed when the nature of the administrative questions involved appeared at the trial (*General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422). The State Court has treated the issues in this case as though they involved only the private interests of private individuals, wholly disregarding their relationship to the transportation system of the United States.

Two issues of administrative cognizance by the Interstate Commerce Commission were presented: one relating to the appropriate car service (*Texas & Pac. Ry. Co.* v. *American Tie Co.,* 234 U. S. 138; *Midland Valley R. R. Co.* v. *Barkley,* 276 U. S. 482), and the other with regard to discrimination (*Mitchell Coal Co.* v. *Pa. R.R. Co.,* 230 U. S. 247). If the State Court had any jurisdiction to deal with the question of discrimination at all, its decision that no undue discrimination existed because the buildings in question constituted a public station is in conflict with decisions of this Court (*Warehouse Co.* v. *U. S.,* 283 U. S. 501, *United States* v. *Idaho,* 298 U. S. 105).

The contract as interpreted by the State Court is illegal because it requires special discriminatory service (*Armour Packing Co.* v. *United States,* 209 U. S. 56; *Davis* v. *Henderson,* 266 U. S. 92; *Colorado* v. *United States,* 271 U. S. 153). The decree below, if not creating further discrimination, perpetuated the discrimination arising under the contract.

The various questions presented are Federal ones, reviewable in this Court (*Texas & P. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *Midland Valley RR Co.* v. *Barkley,*

276 U. S. 482; *Radio Station WOW* v. *Johnson*, 326 U. S. 120).

2. The affirmance of the decree entered by the Trial Court is in disregard of the law as laid down by this Court because it creates a conflict with the authority of the Interstate Commerce Commission (*Radio Station WOW* v. *Johnson*, 326 U. S. 120). The Interstate Commerce Commission has the paramount, if not the exclusive jurisdiction to determine the type of railroad service which an interstate carrier should render to the public, and to determine the public convenience and necessity. The decree here leaves no room or opportunity for the exercise of such jurisdiction by the administrative body.

WHEREFORE, petitioner prays that a Writ of Certiorari issue out of and under the seal of this Court directed to the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department, commanding that Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings therein, and that the order of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department affirming the judgment of the Supreme Court of the State of New York for the County of Kings granting specific performance may be reversed, and that petitioner have such other and further relief in the premises as this Court may deem proper.

Dated: April 17th, 1947.

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition for a Writ of Certiorari and that in my opinion it is well founded and that the action is one in which the petition should be granted.

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No.

BUSH TERMINAL RAILROAD COMPANY,

Petitioner,

—against—

BUSH TERMINAL BUILDING COMPANY.

BRIEF IN SUPPORT OF PETITION

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1. Jurisdiction.

The facts with regard to jurisdiction have been set forth in the foregoing petition.

2. Statute Involved.

Interstate Commerce Act (49 U. S. C.)

§1, (14) *Establishment by commission of rules, etc., as to car service.* The commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this chapter, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.

§3 (1) *Undue preference or prejudices prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

§6 (7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

3. Statement of the Case.

The basic facts have been stated in the foregoing petition. Additional facts will be called to the attention of the Court in the discussion which follows.

4. Summary of Argument.

(a) The State Court erred in holding that it had jurisdiction to determine the issues requiring administrative adjudication and to render a judgment for specific performance in this case.

(b) The State Court erred in not staying its hand when it appeared during the trial that issues were presented which required consideration by the Interstate Commerce Commission.

(c) The State Court's decree creates a potential conflict with the Interstate Commerce Commission.

(d) The contract as enforced by the State Courts is illegal under the Interstate Commerce Act.

5. Argument.

POINT I.

The State Court erred in holding that it had jurisdiction to determine the issues requiring administrative adjudication and to render a judgment for specific performance in this case.

This question was presented to the State Court's consideration by the seventh defense contained in petitioner's answer (83 to 86). The matter was fully discussed at the trial and in the various briefs submitted on appeal.

At the outset this Court's attention should be called to the curious fact that not one of the numerous State Court

judges who passed on this question gave a reasoned explanation of the assumption of jurisdiction. Judge Smith, on the motion under Rule 107 to dismiss for lack of jurisdiction after answer, merely relied on the reasons given by Judge Steinbrink in his refusal to dismiss the complaint. Obviously, however, the two situations were entirely different. Even if Judge Steinbrink was correct in ruling that it did not appear on the face of the complaint that there were issues requiring administrative determination, that ruling could not apply after it appeared from the answer and affidavits that such issues were necessarily involved. At the trial, Judge Walsh merely referred to the previous decision of Judge Smith. Neither of these judges in any way discussed petitioner's contention that there were administrative issues requiring adjudication or the law applicable to such a situation. While Judge Walsh did discuss the subject of undue discrimination, he did not discuss it in this aspect, namely as a jurisdictional question. And as already pointed out, no one of the judges of the higher courts of the State of New York wrote any opinion at all.

The unusual nature of the problem is demonstrated moreover by the fact that the Interstate Commerce Commission declared it contrary to the public interest and convenience to require petitioner to give car service on package freight to plaintiff's buildings 19 to 26 while the New York Courts have made a contrary ruling with respect to plaintiff's Buildings 1 to 10. Both groups of buildings are identical so far as their general character is concerned. The decision of the Interstate Commerce Commission was reached after a consideration of all of the relevant factors, including the public interest. The decision of the New York Court was grounded merely upon the existence of a contract involving solely private interests and made thirty-five years before. The uniformity which is the

guiding principle of the Interstate Commerce Act would be destroyed if contracts could be so availed of and enforced. That uniformity can be maintained only by giving the same tribunal, namely the Interstate Commerce Commission, sole jurisdiction to determine the issues necessarily involved in such a controversy. (See *Mitchell Coal Co.* v. *Penn R. Co.*, 230 U. S. 247, 256.)

It is petitioner's contention that there were two administrative issues which required consideration by the Interstate Commerce Commission and precluded determination by the courts until action had been taken by the Interstate Commerce Commission. These issues were:

a. Whether a particular railroad practice, that is a method of transporting package freight, was in the public interest.

b. Whether undue discrimination would result from directing service in a special manner for one limited group of shippers.

The legal principles applicable are well settled.

1. Where there are issues for administrative determination, the Courts have no jurisdiction to consider such issues. This principle was first laid down in *Texas and P. R. Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426 and was more recently applied in *Armour & Company* v. *Alton Railroad Co.*, 312 U. S. 196.

2. The principle is equally applicable although the complaint itself does not indicate any issue for administrative determination. *Midland Valley R. Co.* v. *Barkley*, 276 U. S. 482.

3. The rule is the same although the action be on contract. *Armour & Company* v. *Alton Railroad Co.*, 312 U. S. 196. Cf. *Colorado* v. *United States*, 271 U. S. 153.

4. When a State Court exercises jurisdiction in violation of these principles, a federal question is presented for review by this Court. *Texas and P. R. Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426; *Loomis* v. *Lehigh Valley Railroad Co.*, 240 U. S. 43; *Northern Pacific Railroad Co.* v. *Solum*, 247 U. S. 477; *Midland Valley Railroad Co.* v. *Barkley*, 276 U. S. 482.

It is clear, therefore, that if petitioner's contention with regard to the existence of administrative issues is correct, the Courts of the State of New York had no jurisdiction to entertain the action or determine the issues.

With Regard to the Railroad Practice.

Whatever may have been the power of the Interstate to deal with car service at the time the contract was entered into in 1911 (See *U. S.* v. *Pennsylvania Railroad Co.*, 242 U. S. 208.), the 1917 amendment to the Interstate Commerce Act clearly gave the Commission that power.

That amendment provided in Section 1, sub-division 14 that the Commission might "establish reasonable rules, regulations and practices with respect to car service of carriers by railroad." This Court has in numerous cases upheld action by the Commission dealing with car service. (*Chicago R. I. and P. Railway Company* v. *United States*, 284 U. S. 80; *United States* v. *American Sheet and Tin Plate Company*, 301 U. S. 402; *U. S.* v. *Wabash Railroad Company*, 321 U. S. 403.)

The Interstate Commerce Commission has often made regulations dealing with the subject. (See Tariffs Embracing Motor Truck or Wagon Transfer Service, 91 I. C. C. 539; Constructive and Off-Track Railroad Freight Stations, 156 I. C. C. 205; Discontinuance of Inland or Off-Track Stations, 173 I. C. C. 727; Trucking Less-Than-Carload Freight, 185 I. C. C. 71; Ex Parte, No. 129,

232 I. C. C. 683.) In dealing with the freight area here in question and with a different group of buildings owned by the same plaintiff, the Interstate Commerce Commission, as we have shown in the annexed petition, approved the use of truck service for picking up and delivering package freight (257 I. C. C. 375).

This Court has pointed out that where a controversy exists with regard to railroad practices, only the Commission can determine that controversy and that no railroad carrier could itself prevent the law from being enforced. See *Texas and P. R. Co.* v. *American Tie and T. Co.*, 234 U. S. 138; *Midland Valley R. Co.* v. *Barkley*, 276 U. S. 482; *Armour & Company* v. *Alton Railroad Co.*, 312 U. S. 196.

As noted in the accompanying petition the Trial Court brushed aside as of no consequence petitioner's contention that the use of freight cars instead of trucks would be wasteful, holding that the freight cars belonged to the connecting truck lines and not to petitioner (2248).

We respectfully submit that this reasoning of the Trial Court is a clear indication of the undesirability of permitting any Court to exercise jurisdiction in a case such as this. The State Court, by treating this case as involving only a private contract, ignored the public interest in the economical use of freight cars, the scarcity of which is well known.

Petitioner submits, therefore, that the question whether or not the railroad freight cars constituted the proper method of transporting package freight was a question which could be determined only by the Interstate Commerce Commission and that no court could compel petitioner to give one kind of service rather than another merely because of a contract made thirty-five years ago.

With Respect to Discrimination.

The undisputed evidence showed that petitioner was giving to all shippers in the entire Bush area (including tenants in buildings owned by petitioner's parent company) the same kind of truck service with regard to package freight that it wanted to give plaintiff's Buildings 1-10. The effect of the State Court decree is to give to Buildings 1-10 a service quite different from that furnished anyone else. Petitioner has consistently contended that this presented a question of undue discrimination which could be determined only by the Interstate Commerce Commission and that no Court, because of a contract, could order that different treatment be accorded different groups of shippers.

We submit that it is no answer to petitioner's contention in this respect to say, as the Trial Court ruled, that there was no discrimination because Buildings 1 to 10 were part of a public station. Where it appears that a question has arisen whether or not undue discrimination exists, that question may be determined only by the Interstate Commerce Commission and not by the Courts. The distinction was made clear by Mr. Justice Brandeis in *Great Northern Railway Co.* v. *Merchants Elevator Company,* 259 U. S. 285 at 291:

> "to determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached

ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

Compare *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344 at 352.

That an issue of undue discrimination was presented by petitioner cannot be disputed. That issue was not destroyed by plaintiff's contention that its buildings 1 to 10 constituted a public station, although the Trial Court assumed this to be the case. The only authority cited by Judge Walsh was *United States* v. *B. & O. Railroad Company*, 231 U. S. 274. That case, however, in no way justifies his assumption that the Courts have any power to determine in the first instance whether or not the fact that a station area is involved eliminates the element of undue discrimination. In that case, the Court was dealing with a determination already made by the Interstate Commerce Commission. The case has, therefore, no application to the situation here presented, where no determination has been made by the Interstate Commerce Commission in the first instance.

Surely no one would contend that the mere fact that the shippers in buildings 1 to 10 were in a station area would justify a court in determining, without resort to the Interstate Commerce Commission, that they were entitled to a lower rate than was allowed to anyone else. Likewise, there is no basis for assuming that they should be allowed the contract benefit of delivery of their package freight by cars at the loading platforms rather than by trucks. An advantage which naturally inheres in being in a station area is merely one of the elements to be considered by the Interstate Commerce Commission.

The distinction between the kind of issue which can be judicially determined and that which can be determined only by an administrative tribunal was clarified by this Court's decision in *Mitchell Coal Co.* v. *Pennsylvania Railroad Company,* 230 U. S. 247. There, a suit was brought for damages because of rebates given by the railroad company. The defendant challenged the Court's jurisdiction on the ground that an issue was presented for determination by the Interstate Commerce Commission. The railroad company claimed that it was justified in making the special arrangements which were challenged as rebates because of special circumstances. This Court concluded that no facts had been shown by the railroad company which presented any issue of justification with regard to certain shippers, but that facts had been presented which raised such an issue with regard to other shippers. This Court held, therefore, that as to these last shippers, the Trial Court had no jurisdiction of the action and that the complaint as to them had been properly dismissed.*

So in the case at bar, when it appeared from petitioner's proof that the service claimed by plaintiff differed from the service offered everyone else, a *prima facie* case of undue discrimination was made out. If plaintiff had not sought to overcome that *prima facie* case by evidence seeking to "justify" the special service it claimed, the Court could, without awaiting any ruling from the Interstate Commerce Commission, have decided only that plaintiff's claim was illegal as constituting undue discrimination. But as soon as plaintiff introduced evidence seeking to

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* Although this Court concluded that jurisdiction was properly declined by the District Court with regard to this particular phase of that case, in fact, this Court stayed the dismissal so as to give the plaintiff an opportunity to obtain a ruling from the Interstate Commerce Commission. That was done because the question of jurisdiction was a novel one and had not been raised at the beginning of the litigation. In the case at bar, the question was raised by defendant as soon as the litigation started and was no longer a novel one.

"justify" its claim for special service, then, under the ruling of the *Mitchell* case, the issue became one for administrative determination and plaintiff's complaint should have been dismissed. In other words, it was beyond the power of the Court to rule on the attempted justification set up by plaintiff that it was entitled to special service because its buildings constituted a station.

POINT II.

The State Court erred in not staying its hand when it appeared during the trial that issues were presented which required consideration by the Interstate Commerce Commission.

Even if this Court should not conclude, as urged above, that the State Court should not have entertained the action at all because of the nature of the issues presented by the pleadings, nevertheless, we submit that when those issues appeared during the trial, the State Court should have refrained from deciding them. At the very least, the Court should have stayed its hand until the Interstate Commerce Commission had determined the administrative issues involved.

Such was the rule laid down by this Court in *General American Tank Car Corporation* v. *El Dorado Terminal Company*, 308 U. S. 422. That was an action brought to recover an amount due under a lease. The answer admitted the making of the agreement but pleaded that payment of the sum demanded would be illegal as being a rebate. The District Court had awarded judgment for the defendant on the ground that the payment required was in law a rebate. The Circuit Court of Appeals reversed on the ground that there were circumstances justifying the payment. In this Court, the question was raised whether the District Court had any jurisdiction whatever to entertain the action.

This Court held that while the District Court had jurisdiction over the subject matter of that action, namely a claim for money damages under a contract, nevertheless, when it appeared that an administrative question was involved, the District Court should have stayed its hand. This Court said at page 428:

> "it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Commission (that is the Interstate Commerce Commission) with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act."

This Court there pointed out that the tariffs contained no provisions for the payment of the money claimed by plaintiff and that on its face an advantage accrued to the shipper. Therefore, said the Court, a question was presented for administrative determination. The supposed justification relied upon by plaintiff was held to be a matter for the Commission and not for the Court. The case of *Mitchell Coal Company* v. *Pennsylvania Railroad Company, supra,* was relied upon.

Accordingly this Court said (p. 433):

> "When it appeared in the course of the litigation that an administration problem, committed to the Commission, was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act."

Everything there said is fully applicable here.

POINT III.

The State Court's decree creates a potential conflict with the Interstate Commerce Commission.

The Trial Court's decree (93 to 96, 105), restricts petitioner to a particular railroad practice until 1960. Before the decree was signed, petitioner, in a counter decree (113-120) requested the inclusion of the following language, after the provision in the decree compelling performance by petitioner: "until such time as the Interstate Commerce Commission or the Public Service Commission shall otherwise order or authorize" (118).

We believe that the refusal of the Trial Court to sign the decree proposed by petitioner and its insistence upon signing a decree imposing an unconditional obligation on petitioner presents a federal question requiring review by this Court just as was the case in *Radio Station WOW* v. *Johnson,* 326 U. S. 120.

In that case, the courts of Nebraska had sustained a contention that the sale of a radio station resulted from fraud. In the judgment setting aside the sale, the Supreme Court of Nebraska recognized that it had no jurisdiction to compel the transfer of the license covering the radio station since such a transfer was within the exclusive jurisdiction of the Federal Communications Commission. But, the state Supreme Court ordered the defendant "to do all things necessary" to secure a return of the license in question. This Court held that such a direction created a potential conflict between the State Court and the Communications Commission and that no steps should be taken to carry out the State Court's decree until the Communications Commission had had an opportunity to pass upon the license question.

So here the State Court has either taken the matter entirely out of the hands of the Interstate Commerce Com-

mission, or has put petitioner in a position where, if the Interstate Commerce Commission should take action, petitioner may be caught between two fires. The very least which the State Court should have done was to make it clear that its mandate would no longer be effective should the Interstate Commerce Commission at any time conclude that the service ordered to be rendered by the Court was not in the general public interest. Surely petitioner should not be forced to chose between two commands and be required at some time in the future to seek an adjudication as to which of these two commands it must obey. No State Court decree should be so framed as even by implication to limit the future freedom of action of the Interstate Commerce Commission.

POINT IV.

The contract as enforced by the State Courts is illegal under the Interstate Commerce Act.

It is clear, beyond the need for elaborate argument, that any special service granted by a carrier to a particular shipper beyond that provided in published tariffs as available to everyone is illegal. This Court has repeatedly so held. *Armour Packing Co.* v. *United States,* 209 U. S. 56; *Davis* v. *Cornwell,* 264 U. S. 560; *Davis* v. *Henderson,* 266 U. S. 92; *C. & O. Railway* v. *Westinghouse Co.,* 270 U. S. 260.

Petitioner contends that the contract here relied upon by plaintiff and sustained in the State Courts is illegal, both because the service demanded was not open to all persons under any tariff and because it created an undue discrimination.

While the Trial Court, in its opinion (2249), held that the service called for by the contract was the same as that contained in the filed tariffs, there is no basis for that holding. The only tariff which was referred to by the Trial

Court (2255) was the Curlett Local Freight Tariff, Exhibit WW (pages 738 to 740). This tariff will be searched in vain for any undertaking on the part of the carrier to give all shippers the right to insist on the employment of freight cars for the transportation of package freight. It is true, as the Court stated (2256), that this tariff in Note 2182 exempts from the "pick up and delivery" tariff certain described portions of the Bush area which correspond to Buildings 1 to 10. (See 2216, 2217). The only effect of this provision, however, is to eliminate the shipper's obligation to pay a minimum charge where the rate amounts to less than forty-five cents per hundred pounds (2213). There is nothing in this tariff which prohibits the carrier from using trucks as a "substitute" service (1513-1519). In other words, the tariff has no relation whatever to petitioner railroad's method of transporting freight, but only to the rates.

There is consequently no basis whatever for the Trial Court's conclusion that the contract provides a service specified in the tariff.

We have already discussed the question of discrimination. There remains to add here only the point that if the question of discrimination was open to the State Courts at all, then the conclusion reached by the State Courts was at variance with decisions of this Court and of the Interstate Commerce Commission and results in a denial of that uniformity which is the essence of the Interstate Commerce Act.

The only basis on which the State Court concluded that the special service called for by the contract did not constitute undue discrimination was that buildings 1 to 10 constituted a public freight station (2255 ff). We submit that the State Court disregarded the undisputed facts and the controlling interpretations of the Interstate Commerce Act in reaching this conclusion.

Plaintiff had contended both before the Interstate Commerce Commission and later before the Public Service Commission, that buildings 19 to 26 constituted a public freight station. It based its argument upon many of the same considerations which led it in the case at bar to claim that Buildings 1 to 10 were freight stations.

The Interstate Commerce Commission did not pass on the contention, pointing out that whether or not the buildings were freight stations made no difference from the point of view of public convenience and necessity with regard to the use of trucks instead of freight cars. The Public Service Commission ruled that these buildings were not public stations (see footnote, p. 8, *supra*).

Petitioner submits moreover that there was no basis for holding that buildings 1 to 10 in fact constituted a public station. There was no evidence that these buildings had ever been used by anyone other than plaintiff's tenants. The physical layout of the buildings is such that no outsider could have brought freight to the loading platforms without passing through plaintiff's property.

It is true that the Trial Court contended that the buildings had been named as freight stations in the tariff (2255 to 7). The tariff, however (Exhibit WW, 2215) merely referred to the 36th Station without in any way identifying what was intended. The further contention (2257) that the tenants of buildings 19 to 26 used "this public freight station" is entirely without support in the evidence.

In *Merchants Warehouse Company* v. *United States*, 283 U. S. 501 this Court ruled that whether or not a station is a public one depends on its actual use by the general public. The trial Court (2260) sought to minimize that ruling by quoting only a small portion of the opinion, one which referred to the fact that freight from outsiders had been rejected. It is submitted that this circumstance did not alone determine the decision of this Court. A

reading of the opinion clearly indicates that this Court based its decision upon the fact that the buildings there in question had never been used by the public generally. It is significant to note that in that case this Court held immaterial the fact that the buildings had been described as a station in the tariffs.

Petitioner believes that decisions of this Court and of the Interstate Commerce Commission require the conclusion that the tracks which went into buildings 1-10 constituted private industrial sidings and not a public station. The leading case is *United States* v. *Idaho*, 298 U. S. 105. See also *A Cancellation of South Georgia Railway Switchings Arrangements*, 83 I. C. C. 23 and *Standard Oil Co.* v. *Southern Railway*, 159 I. C. C. 342.

The subject of what constitutes a public station was also discussed at some length in *St. Louis Missouri* (*Cupples Station*) *Terminal Regulations*, 40 I. C. C. 425. In that case the Commission reached the conclusion that the buildings did constitute a public station only because the proof showed a substantial use of the buildings by the general public. In the case at bar the uncontradicted proof is that there was never any use of the buildings by the general public. Consequently they cannot be considered as a public station. The holding to the contrary by the New York Courts is, therefore, at variance with the applicable decisions of the Interstate Commerce Commission and of this Court and destroys that uniformity of interpretation which the Interstate Commerce Act requires. We submit, therefore, that the attempted justification for the evident preference in this case has no basis in fact or law and that the contract relied upon by plaintiff and enforced by the State Courts is accordingly illegal.

CONCLUSION.

It is respectfully submitted, therefore, that questions of general interest in relation to interstate carriers are presented here which were decided by the Courts of the State of New York contrary to the applicable rulings of this Court and that the application for Certiorari should be granted.

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

ARTHUR GARFIELD HAYS,
JOHN SCHULMAN,
OSMOND K. FRAENKEL,
MORRIS SHILENSKY,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1310

BUSH TERMINAL RAILROAD COMPANY,
Petitioner,

against

BUSH TERMINAL BUILDINGS COMPANY

BRIEF OF BUSH TERMINAL BUILDINGS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ABNER J. GROSSMAN
MARTIN A. SCHENCK
CHARLES E. COTTERILL
Attorneys for Bush Terminal Buildings Company

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BRIEF OF BUSH TERMINAL BUILDINGS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In this action the State courts of New York have decreed specific performance of a written contract entered into by the petitioner for certiorari. For more than thirty years the petitioner lived up to the obligations of that contract and never questioned its validity. But for reasons of private gain to itself, as pointed out in the opinion of the Supreme Court of New York, the railroad petitioner commenced in 1942 consistent violations of the agreement and, in the ensuing several years of litigation over it, has persistently sought to avoid further observance of its agreement. Its points of view regarding the validity of the contract were presented unsuccessfully by it five times in this litigation to the Supreme Court of the State of New York, twice to the Appellate Division of the Supreme Court of New York, and once before the Court of Appeals of the State of New York. When leave to further appeal to the Court of Appeals was again lately sought the Appellate Division, and the Court of Appeals itself, deemed the case for petitioner so lacking in merit that even permission further to appeal was denied. Now, after that lengthy and unsuccessful judicial effort to escape its contract for the

remainder of its term, the railroad is petitioning this Court for writ of certiorari.

In its petition for certiorari the petitioner does not say that the case itself is one of broad general interest or that there were presented in it any novel undecided questions of law of widespread importance. Furthermore there is no contention that any decision of a question of law by the New York State Courts in the present litigation was in conflict with a decision of the same or substantially the same question of law by the appellate court of any other state or of the United States. It is not even said that there are frequent contractual situations of the sort here involved that would now or in the future be affected by the outcome of this litigation.

All that is suggested as a basis for the petition for certiorari is that the New York courts, in requiring enforcement of the particular railroad contract involved, committed *error* in their refusal to *apply* certain well-established and not disputed rules of law which the petitioner had urged *should* apply but which the courts of New York State and the respondent have said do *not* apply.

In other words certiorari is sought only to correct a *claim of error* in the non-application of certain familiar rules of law which are not themselves in question. Consequently were this court to grant certiorari in this case its final decision on the merits would not establish any *new* rules of law or resolve any *conflicts* of decisions as between inferior courts, nor would there be settled any presently unsettled matter of widespread general importance of contract interpretation and enforcement.

Certiorari is not a substitute for the old writ or error from this court to state courts. Much more is now required to be shown in a petition for certiorari than a mere claim that the state courts erroneously did not apply previous decisions of this and other courts with respect to well understood and undisputed principles which, however, the state courts did not consider to be involved.

I.

The stated reasons upon which the petitioner relies for issuance of the writ.

It is said in formal terms that the writ should be allowed for the following two reasons:

1. That the intermediate appellate court of New York State failed to apply to the particular facts the principle that judicial action may not be taken as to a matter in litigation concerning which there are deemed by a defendant to be present administrative questions not yet determined by the appropriate administrative agencies and that in any event judicial action should here have been stayed pending administrative inquiry.

2. Although put forth as an entirely different reason for the writ the second one stated is in reality but a variation of the first. It is that because in fact the New York Courts did exercise judicial authority their action in doing so was (it is claimed) in conflict with the "paramount if not exclusive" authority of the Interstate Commerce Commission.

But the Interstate Commerce Commission did not share the view that it possesses either exclusive or even paramount administrative authority over the subject matter of this particular contract. Three times during the course of this judicial litigation the railroad petitioner for certiorari applied to that Commission for the institution of an investigation by it into the lawfulness, administratively, of the involved agreement. On each of those three occasions the Commission declined even though it had before it in the railroad petitions a full recital of all the factual and argumentative claims.

Furthermore this particular railroad contract, in paragraph 5 (printed record page 751) contains the following express language:

> "(5) *By both parties hereto,* that the terms and provisions of this contract are binding upon the re-

> spective successors and assigns of the parties hereto, provided that nothing herein contained shall be contrary to the regulations of the Interstate Commerce Commission, the Public Service Commission or any law to regulate traffic operations, as the same may from time to time become effective."

Taking note of that language the Supreme Court of the State of New York called to particular attention that in requiring specific enforcement of the contract——

> "Nothing in the determination of the court in this case is intended to contravene any such regulations or law or to assume the jurisdiction or authority of those bodies or to anticipate their future action".

Hence, in ordering specific performance, the State courts have not barred any right of an administrative agency to inquire whether, in its practical operation, the contract would violate any regulatory law.

ARGUMENT

What is said above may be enough but the following is added more by way of detail.

In 1911 the Bush Terminal Railroad Company (the petitioner) entered into a written agreement with the Bush Terminal Buildings Company. The two corporations were, at that time, under a common ownership and control, Mr. Irving T. Bush having been the founder of the enterprise well known in the shipping world under the popular name "Bush Terminal". It was after that common control ended that the attempted breach of the contract occurred and this litigation thereupon had to be commenced.

The contract was entered a number of years ago at the time when the Bush company was undertaking to raise new capital for the construction of ten large industrial loft buildings near the waterfront of Brooklyn, New York, to be numbered 1-10. A bond issue of about twelve millions of

dollars was to be floated. To facilitate their sale the involved contract was here entered into. Reciting in terms that the Buildings Company required the contract in order to create a better market for the sale of its bonds then issued and to be issued the written agreement provided that throughout the term of the contract the Bush Terminal Railroad Company would "reasonably provide and will properly operate adequate cars and motive power" for freight transportation between the Buildings 1-10 and the piers, warehouses, and other properties of the Bush Terminal Company.

Separately the petitioner leased from the Buildings Company the ground floors of the buildings and made of them its public freight station for the receipt and delivery of property. *That was the only place for the receipt and delivery of less than carload freight shipments on the line of railroad of the petitioner until 1945.* The existence of that public freight station was amply described in the railroad tariffs on file with the Interstate Commerce Commission and Public Service Commission of the State of New York. That a bona fide public freight station was so created at that place (known as the "36th Street Station") has been found and determined by the Interstate Commerce Commission (*Re Application of Bush Terminal Railroad Company* 257 I. C. C. 375) by the Public Service Commission of the State of New York (*United Cigar-Whelan Store et al.* v. *Bush Terminal Company,* Case No. 11655, decided May 25, 1945) and by the Supreme Court of the State of New York in this litigation on a full record before it.

For more than thirty years the petitioner lived up to its contract and likewise received its benefits. Freight car services to and from these buildings were continuously maintained until the breach complained of.

In the upper stories of these Buildings 1-10 more than 100 different shippers have occupied space where they have conducted their separate businesses calling for freight to be received and shipped by them by railroad. Being located in the same buildings as where the petitioner railroad has

its public freight station those shippers derive an economic benefit from the fact that their freight comes to them at that station or leaves them at that station in railroad cars which the Bush Terminal Railroad Company pulls with its electric locomotives over its own tracks in terminal service between these buildings and points of interchange between it and the trunk line railroads on both sides of New York Harbor.

The petitioner has not applied to the Public Service Commission of the State of New York for authority under the laws of that state to abandon its public freight station at these buildings 1-10 and it may not abandon that station without such authority because, barring any very extensive track alterations, Congress has chosen to leave to the states rather than to the Interstate Commerce Commission control over the location of public freight stations (*R. R. Com. of Cal.* v. *So. Pac.*, 264 U. S. 231; *I. C. C.* v. *U. S. ex rel. City of Los Angeles*, 280 U. S. 52; *Corp. Com. Okla.* v. *A. T. & S. F. Ry. Co.*, 101 I. C. C. 647). Instead, without seeking the exercise of state administrative authority over station abandonments, the plan of the petitioner has been to use another and recently established (1945) one of its stations (48th Street Station in Brooklyn) as the place where its railroad common carrier obligation of receiving and delivering property of the shippers in Buildings 1-10 would begin or end. Between that new 48th Street Station and these Buildings 1-10 the petitioner has wished to institute what is popularly called "store door collection and delivery" service by motor vehicles just as that kind of accessorial service is offered by it to shippers and consignees throughout Brooklyn remote from its rails. This intended discontinuance of common carrier railroad less than carload freight service, in freight cars, to and from the public freight station in Buildings 1-10, and the intent to offer instead mere store door collection and delivery service by motor trucks to and from the different station at 48th Street, would be nothing more than to offer an accessorial supplemental "terminal service" wholly voluntary in na-

ture, not required by law as a part of railroad common carrier duty, and something which would be capable of withdrawal at will. (*New York Dock Co.* v. *P. R. R. Co.*, 62 Fed. 2d, 1010; *Merchant Truckmen's Bureau* v. *U. S.*, 16 F. Supp. 999; *American Trucking Asso.* v. *U. S.* 17 F. Supp. 655; *Re Pickup and Delivery*, 281 I. C. C. 441).

For solid carload shipments the continued existence of the public freight station at Buildings 1-10 seemingly is planned.

The courts of New York, properly, have directed that petitioner fulfill its contract as to less than carload shipments which has yet a number of years to run until the bonds mature. That contract looks to the performance of railroad common carrier services to and from Buildings 1-10. There is no indicated purpose on the part of petitioner to "abandon its line of railroad" to and from the station at those buildings. Instead, as found by the Supreme Court of New York, the petitioner actually planned, as to less than carload shipments, to continue to retain the agreed "divisions of through rates" between it and the trunk line railroads to and from the station in Buildings 1-10 and at the same time obtain from those same trunk line railroads additional compensation for the new store door collection and delivery services to and from Buildings 1-10 which it has wished to institute. That would redound to its greater profit, the courts below finding that no economy of operation was shown by the record to be in prospect.

The courts of New York find nothing in the contract sued upon rendering it presently unforceable. They do not look upon the case as calling for any invasion of administrative authority by them. While paragraph 14 of Section 1 of the Interstate Commerce Act speaks of the administrative authority of the Commission to establish reasonable "rules, regulations, and practices" with respect to "car services" by railroad carriers, that paragraph is only one of a number of related paragraphs all of which have to do with the assurance of fair and non-discriminatory rules for the distribution of available freight cars as between various dif-

ferently located shippers *in times of car shortages.* (*Assigned Car cases* 274 U. S. 564.) Paragraphs 10, 11, 12, 13 and 15 of Section 1 of the Act are the cognate provisions of which paragraph 14 is but a part, and all relate to "car shortage" rules of distribution or some other question of discriminatory use of cars. The mere failure or refusal of a railroad to furnish cars at a given station does not call for invocation of administrative authority. (*Corpus Juris Secundum,* Vol. 13, p. 69 et seq.)

When a railroad contractually agrees to furnish freight car services to and from a given location at which its public freight station exists such a contract is not of itself void. So to use freight cars is wholly normal and usual. No "special service" either in fact or requiring tariff publication exists in such use of railroad cars and locomotives for the receipt and delivery of freight at a public station.

True enough the many other shippers scattered throughout Brooklyn, including some in other buildings reached by rails of the Bush Terminal Railroad Company are, as to their less than carload freight shipments, required to do one or the other of two things: either they must at their own primary expense get their freight to and from a railroad station or, at their own election, accept the railroad "store door collection and delivery" plan. Were it to be thought by any of those shippers (none of whom have filed complaint with administrative bodies) that they are economically disadvantaged and unlawfully discriminated against as compared with the shippers who are located in Buildings 1-10 and who therefore receive freight car services the obvious answer is the one given by the courts of New York. The mere economic advantage of shipper location in or near to a railroad public freight station is not an unlawful discrimination (*U. S.* v. *B. & O. R. R. Co.,* 231 U. S. 274; *Merchants Warehouse Co.* v. *U. S.,* 283 U. S. 501) when such location gives rise to the opportunity of utilizing most conveniently the customary railroad facilities which the servicing of a station entails.

II.

The New York Courts have disavowed the intent to invade the administrative province of either the Federal or State Regulative Bodies.

It did not appear to the courts of New York State that present enforcement of this contract would violate any provision of regulatory law by invading administrative authority. On the contrary: the Supreme Court of New York disavowed any such intent and called to attention that by the very terms of the contract (paragraph 5 of it) the following was a part of the agreement:

> "(5) *By both parties hereto,* that the terms and provisions of this contract are binding upon the respective successors and assigns of the parties hereto, provided that nothing herein contained shall be contrary to the regulations of the Interstate Commerce Commission, the Public Service Commission or any law to regulate traffic operations, as the same may from time to time become effective."

The decision of this court in *General American Tank Car Corp.* v. *Eldorado Terminal Company,* 308 U. S. 422, was at all times before them in this litigation and taken into consideration by the courts of New York State. That was not an action in equity for the enforcement of a contract. It was an action at law for the recovery of damages for the claimed past breach of a contract. By way of defense to that action at law the railroad asserted the contract there sued upon called upon it to pay a sum of money greater than would be "reasonable" and hence, in result, such payment would create a discriminatory rebate. This Court observed that it was the peculiar function of the Interstate Commerce Commission, as an expert administrative body, to inquire whether allowances by railroads to shippers for the use of tank cars were "reasonable" in amounts. Hence,

it was held, the action for damages should have been judicially stayed long enough to afford an opportunity for the Interstate Commerce Commission to pass upon the reasonableness of the amount of the agreed allowance.

Here, in the present action, however, no such question of "reasonableness" is presented. Instead the railroad petitioner has merely taken the position that for it to use railroad freight cars when receiving and delivering less than carload shipments *at one of its public freight stations* there inherently results a "discriminatory special service" as compared with its store door collection and delivery service by motor vehicles throughout Brooklyn when receiving and delivering less than carload shipments at the places of business of shippers and consignees who are *not* located in a public freight station.

Rightly the courts of New York State concluded that no substantial question of discrimination or other administrative question was presented by that character of defense. In any event the holding was that nothing in the decision of this case was intended to "anticipate the future action" of any administrative body which might conclude hereafter to consider the situation.

For no clear reason the petitioner has all along supposed that its position in this litigation derives support from a prior decision of the Interstate Commerce Commission in *"Re Bush Terminal R. R. Co.,"* 257 I. C. C. 375. But there entirely different buildings were involved. No question of contract enforcement as to railroad operations to and from them was presented. That case arose upon an application for "extension of line of railroad" under Section 1(18) of the Interstate Commerce Act. Certain protesting shippers urged that should the application be granted it should be conditioned upon a requirement that railroad freight car services to and from those other buildings be reinstituted. The Commission concluded that the public convenience and necessity did not so require the imposition of that "con-

dition". There was no holding that the voluntary or contractual use of railroad cars at those other buildings would have been unlawful in any respect had a contract with regard to common carrier railroad service to them been entered.

Conclusion

Under the circumstances it is respectfully submitted that no occasion for the issuance of a writ of certiorari here exists.

Respectfully submitted,

ABNER J. GROSSMAN,
100 Broad Street,
New York City.

MARTIN A. SCHENCK,
1 Wall Street,
New York City.

CHAS. E. COTTERILL,
70 East 45th Street,
New York City.

For the Bush Terminal Buildings Company in opposition.